SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 607

AMERICAN LUMBERMEN'S MUTUAL CASUALTY COMPANY OF ILLINOIS,

Petitioner,

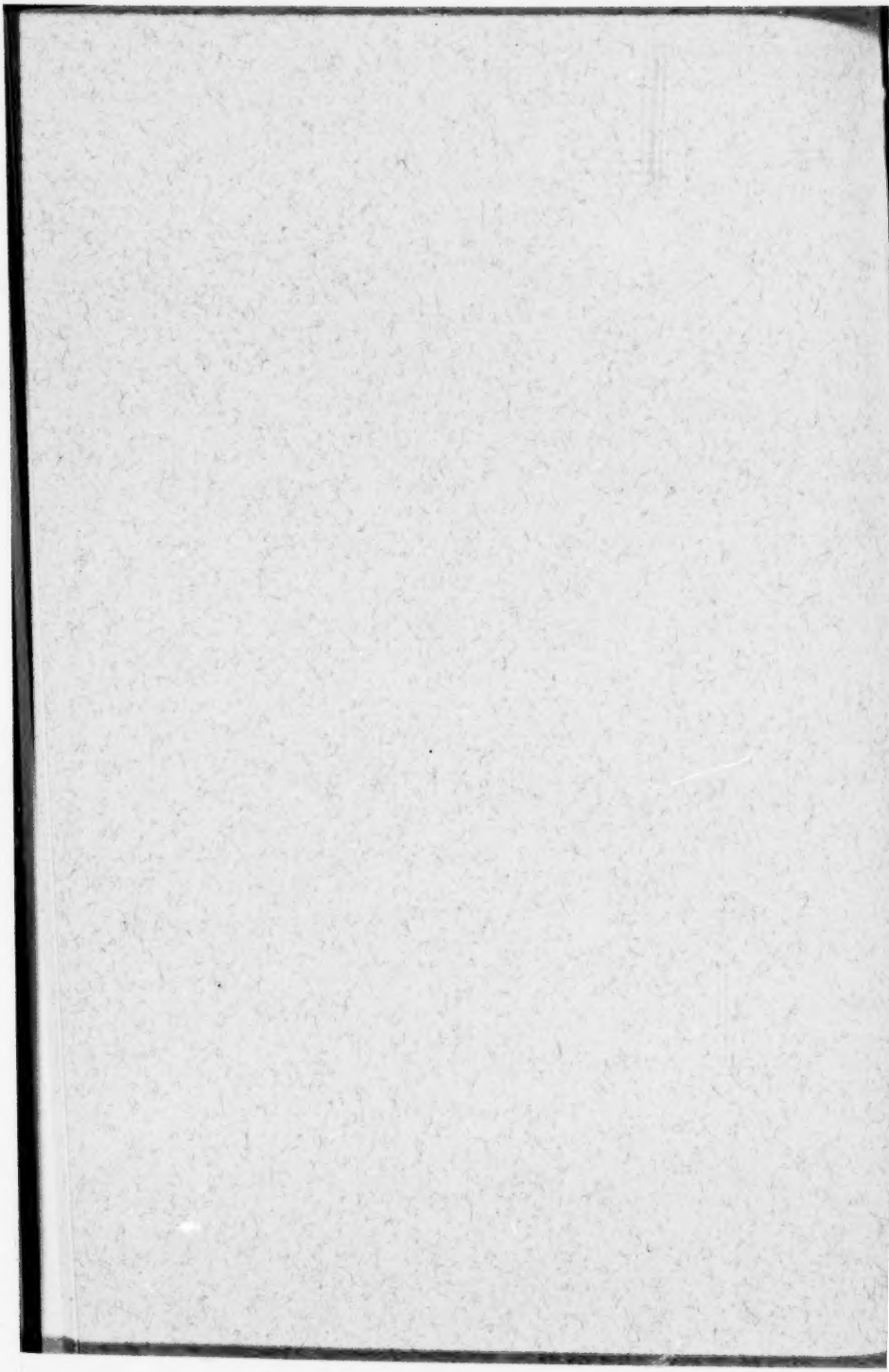
vs.

ELIZABETH SUTCLIFFE, AS ADMINISTRATRIX DE BONIS NON OF THE GOODS, CHATTELS AND CREDITS WHICH WERE OF MARGARET SUTCLIFFE, DECEASED, GEORGE FUERST AND ELIZABETH SCHENCK.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

FREDERICK A. KECK,
Counsel for Petitioner.

FRED L. GROSS,
Of Counsel.



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SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Supreme Court of the United States:

Your petitioner respectfully prays that a writ of certiorari be issued to review the decree (R. 122) of the United States Circuit Court of Appeals for the Second Circuit, made and filed on November 30, 1940, modifying a judgment of the United States District Court for the Eastern District of New York, rendered May 15, 1940 (R. 100), in an action brought by the above named respondents against the petitioner.

Opinions Below.

The opinion of the District Court (R. 87) is reported in 33 Fed. Supp. 130.

The opinion of the Circuit Court of Appeals has not yet been reported but is printed in the record (R. 115).

Jurisdiction.

The decision of the Circuit Court of Appeals was rendered November 12, 1940. The decree of modification was entered November 30, 1940. By direction of the Circuit Court of Appeals made December 2, 1940, the issuance of its mandate was stayed pending the consideration and decision of this petition for writ of certiorari, upon condition that there be filed with the Clerk of said Circuit Court, on or before December 9, 1940 of a certificate of the Clerk of this Court that this petition, the record and briefs have been filed.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (28 U. S. C. A. Sec. 347).

Reasons Relied On for Allowance of the Writ.

The decision of the Circuit Court of Appeals is in conflict with applicable local decisions on important questions of local law,

(a) in that the Circuit Court of Appeals, in construing a generally used form of automobile liability insurance policy interpreted the extended coverage clause therein in aid of extending the amount of the coverage to persons actually mentioned by name in the policy, whereas, under the settled law of New York, the extended coverage clause extends the insurance to persons not actually mentioned by name in the policy and does not prohibit limitation of the amount of the coverage;

(b) in that the Circuit Court of Appeals, applied the rule of strict construction against petitioner insurance company in an action brought under Section 109 of the New York Insurance Law, by an injured person against the in-

surer of the person liable for the injuries, as if the right of action of such injured person were derived from the insurance policy, whereas, under the settled law in New York, the right of action of the injured person is derived from the statute, which is in derogation of the common law and must be strictly construed.

Summary of Matter Involved.

Respondents brought suit in the Supreme Court of the State of New York against Maxweld Corporation, and recovered judgments totaling $37,500, plus costs, as damages for injuries sustained in an automobile collision. Thereupon, respondents brought suit under Section 109 of the New York State Insurance Law (now Sec. 167) against the petitioner American Lumbermen's Mutual Casualty Company of Illinois on an automobile liability insurance policy issued by the petitioner.

Said section of the New York Insurance Law authorizes the injured person, if his judgment remains unpaid for thirty days, to bring suit against the insurance carrier "under the terms of the policy for the amount of such judgment not exceeding the amount of the policy."

This action, under the terms of the policy, was tried before the District Court of the United States for the Eastern District of New York, without a jury.

Both sides agreed that there was no ambiguity in the language of the policy (R. 33).

The District Court sustained petitioner's contention that the coverage limit of the policy was $10,000. (See opinion, R. 87; 33 Fed. Supp. 130.) Findings to that effect were made (R. 95), and judgment rendered accordingly (R. 100). On appeal by respondents the United States Circuit Court of Appeals for the Second Circuit modified the judgment of the District Court and sustained respondents' contention that the coverage limit of the policy was in excess of $10,000,

and awarded judgment for the full amount of the judgments recovered in the negligence action (R. 121).

Statement of Facts.

Earl C. Maxwell was the president of Maxweld Corporation (R. 65) which was engaged in manufacturing tanks in Brooklyn, N. Y. (R. 58).

In July, 1934, Maxwell bought a Buick Sedan which he paid for personally (R. 64, 65), and which was registered in his name and a New York State automobile license issued to him (R. 63).

Maxwell frequently used the car in the performance of his duties as president of the Maxweld Corporation (R. 65).

On the evening of December 4, 1934, Maxwell, accompanied by Patricia Sickles and Mae Cutter, drove to Northport, L. I. in the Buick car (R. 59). Upon returning about midnight, Maxwell's car, going west, collided with an automobile driven by George Fuerst, going east (R. 60). Fuerst was accompanied by Margaret Sutcliffe and Elizabeth Schenck (R. 60). All of the occupants of both cars were injured. Miss Sutcliffe died of her injuries and Maxwell died a few days after the accident (R. 60).

All of the injured persons and the administratrix of the deceased Miss Sutcliffe then brought suit against the Maxweld Corporation in the Supreme Court of the State of New York (R. 58), upon the claim of negligence on the part of Earl Maxwell, and recovered judgment (R. 60, 61). Upon return of unsatisfied executions, they brought this suit under Section 109 of the New York Insurance Law aforesaid, against the petitioner insurance company.

Meanwhile, Maxweld Corporation had appealed from the judgments in the negligence action, with the ultimate result that on November 21, 1939, the New York Court of Appeals affirmed the judgment in the negligence action in favor of Fuerst and his two companions but reversed the judgment

in favor of Patricia Sickles and Mae Cutter, who were riding in the automobile with Maxwell. New trials were granted to them because there was no evidence showing that these ladies, in accompanying Maxwell, did so in connection with the business of the Maxwell Corporation.

The New York Court of Appeals specifically said that the automobile "was registered in the name of the president and paid for by him but was used at times upon the business of the corporation" (R. 68).

Patricia Sickles and Mae Cutter then discontinued this action on the policy (R. 56). Fuerst and the other two plaintiffs went forward with this action.

Section 109 of the New York Insurance Law so far as pertinent and as it read up to 1935 (see N. Y. Laws of 1924, Chap. 639), provided as follows:

> "Sec. 109, Standard provisions for liability policies. No policy of insurance against loss or damage resulting from accident to or injury suffered by an employee or other person and for which the person insured is liable, * * * shall be issued or delivered in this state by any corporation or other insurer authorized to do business in this state, unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy, and stating that in case execution against the insured is returned unsatisfied in an action brought by the injured person, or his or her personal representative in case death results from the accident, because of such insolvency or bankruptcy, then an action may be maintained by the injured person, or his or her personal representative, against such corporation under the terms of the policy for the amount of the judgment in the said action not exceeding the amount of the policy. * * * No such policy shall be issued or delivered in this state on or after July first, nineteen hundred and twenty-four, to the

owner of a motor vehicle, by any corporation or other insure * authorized to do business in this state, unless there shall be contained within such policy a provision insuring such owner against liability for damages for death or injuries to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission express or implied, of such owner.

"A policy issued in violation of this section shall, nevertheless, be held valid but be deemed to include the provisions required by this section, and when any provision in such policy or rider is in conflict with the provisions required to be contained by this section, the rights, duties and obligations of the insurer, the policy-holder and the injured person shall be governed by the provisions of this section."

The requirement of the first part of the aforesaid section constitutes what is known as the Financial Responsibility Clause. The latter part of the section provides for what is known as the Extended Coverage Clause.

Many States have statutes requiring insurance policies to contain either or both of such clauses either in identical or substantially similar language.

(See, as illustrations, Wisconsin Statutes, 204.31; 1929 Rev. Mo. Statutes Sections 5898, 5899; N. H. Laws 1927 Chap. 54; N. J. Laws 1931 p. 343; Vol. 1, 1911-1924 Suppl. Comp. St. of N. J. p. 1589; Ohio Gen. Code, 9510-3; Cal. Gen. Laws 3738.)

Insurance companies, desiring to use a single form of insurance policy conforming with the requirements of the various States, have consequently written their policies to include the aforesaid clauses in language designed to comply with the statutes of the various States, so that, in some instances, the clauses in the policy may include provisions not required in some of the States.

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* So in original. (Evidently should be "insurer".)

The policy in suit (Exh. 5, R. 71) was delivered in the State of New York (R. 73) and contained, among other provisions, the following two clauses which adequately complied with the New York statute in respect of extended coverage, to wit:

"EXTENDED COVERAGE—The terms and conditions of this Policy are so extended as to be available, in the same manner and under the same conditions as they are available to the Named Assured, to any person or persons while riding in or operating any of the automobiles described in the Special Conditions, and to any person, firm or corporation legally responsible for the operation thereof, provided such use or operation is with the permission of the Named Assured, or, if the Named Assured is an individual, with the permission of an adult member of the Named Assured's household other than a chauffeur or a domestic servant; provided, that no person, firm or corporation other than the Named Assured shall be covered hereunder if there be any other insurance which covers the loss of such other person, firm or corporation or which would cover if the insurance granted hereunder had not been effected. This Policy shall not cover the liability of an employee of any Assured, with respect to any action brought against said employee by another employee of the same Assured, on account of an accident arising out of the operation or use of the automobile in the business of such Assured. Any insurance under this Policy shall be applied first to the protection of the Named Assured and the remainder, if any, to the protection of any other Assured. This paragraph shall not operate to extend this Policy to cover the liability of a public automobile garage, automobile repair shop, automobile sales agency, automobile service station, automobile parking station, or the agents or employees thereof.

* * * * * * *

"ASSURED AND NAMED ASSURED DEFINED—The unqualified term 'Assured' wherever used in this Policy shall include in each instance the Named Assured and

any other person, firm or corporation entitled to coverage under the terms and conditions of this Policy, but the qualified term 'Named Assured' shall apply only to the Assured named and described in Special Condition 1."

The Questions Presented and Specification of Errors.

The Circuit Court of Appeals erred

(1) in construing the Extended Coverage clause in an automobile liability insurance policy issued under the New York Insurance Law, as if such clause may be considered as an aid in extending the amount of the coverage as to persons actually mentioned by name in the policy, whereas, under the local law of New York, such clause only extends the insurance to cover the negligence of persons not mentioned by name in the policy but operating the automobile with the permission of the owner. It does not prohibit limitation of the amount of the coverage;

(2) in applying the rule of strict construction against the insurance company in an action brought under Section 109 of the New York Insurance Law, by an injured person against the insurer of the person liable for the injuries, as if such right of action were derived from the insurance policy, whereas, under the settled law of New York, the right of action of the injured person is derived from the statute, which is in derogation of the common law and must be strictly construed.

WHEREFORE, your petitioner respectfully requests that a writ of certiorari be granted as prayed.

Dated December 3, 1940.

AMERICAN LUMBERMEN'S MUTUAL CASUALTY COMPANY OF ILLINOIS,

By FREDERICK A. KECK,

Counsel for Petitioner,
16 Court Street,
Brooklyn, N. Y.

SUPPORTING BRIEF.

I.

The extended coverage clause required by the New York Insurance Law to be included in automobile liability insurance policies, cannot be considered as an aid in extending the amount of the coverage with respect to persons actually mentioned by name in the policy. It merely extends the insurance to cover the negligence of persons operating the automobile with the express or implied permission of the owner. The clause does not prohibit limitation of the amount of the coverage.

Where the Circuit Court of Appeals, in construing a policy of insurance, considers the question as one of general law and not as governed by the rulings of the State court, certiorari will be granted.

New York Life Ins. Co. v. *Jackson,* 304 U. S. 261.

The insurance policy under which respondents made their claim (Exh. 5, R. 71, offered at R. 37 fol. 109) consisted of a face page entitled "Special Conditions." On the back of this face page appeared approximately one-half of the General Conditions. Approximately at the center of the General Conditions, the sheet folded, the balance of the General Conditions was printed on the continuation of the second page, and constituted the third page of the policy. On the back of the third page appeared the usual "cover" or outside face of the policy. Inserted between pages two and three was a rider.

On the first page of the policy, Maxweld Corporation is stated to be the Named Assured. Paragraph 9 stated that the Named Assured "is the sole owner of the automobile (singular) except as follows:" No exception was stated, obviously because the language of paragraph 8 already

covered the subject by stating that the automobiles covered by this policy, the kind of insurance provided, the limits of liability and the premiums to be paid "are stated below," and that no liability is assumed for any coverage unless a specific premium charge is entered in the schedule.

The paragraph on page 2, entitled "Public Liability" plainly states that the coverage is limited to $5,000 for injury to one person and $10,000 for one accident.

The paragraph on page 2 entitled "Increased Public Liability Limits" provides that if a premium has been charged therefor and is so indicated in the Special Conditions, then the limits of liability shall be as stated in the Special Condition as "Increased Public Liability Limits."

Turning back to the face of the policy to ascertain the amount of "Increased Public Liability Limits" stated in the Special Conditions, we are, under the heading of increased liability limits, directed to "See Schedule".

So also with respect to a description of the automobiles, we are directed to "See Schedule Attached." Plainly, this means that the rider attached is to be consulted to ascertain the increased liability limits and also the trade name, style and type of the automobiles.

In the first column of the schedule on the face of the policy is the heading "Liability (Limits $5,000. One Person, $10,000. One Accident) premium." Below these words are the figures 213.00.

Plainly that is the only place in the policy where all the automobiles listed in the rider are covered as a group. It is the only place where a premium is charged for the group and the limit is plainly $10,000.

In the second column of the schedule on the face of the policy is the heading, "Increased Public Liability Limits." No amount of coverage is there stated. A premium of 51.87 is charged. For the coverage, we are directed to "See Schedule."

The rider or "Schedule" attached, lists four automobiles as covered by Increased Public Liability Limits. The first is a Dodge Sedan, and the heading shows, "Protects Interests of" Earl Maxwell up to $50,000. This Dodge sedan was turned in by Earl Maxwell (R. 64) in part payment of the Buick automobile hereinbefore mentioned, long before the policy was issued but the company had apparently not been so notified until January 29, 1935 (see additional rider of Exh. 5).

The second automobile mentioned is a 1931 Buick, "Protects Interests of" Harry A. Franz, up to $20,000.

The third automobile mentioned is a Ford roadster, "Protects Interests Of" Maxweld Corporation up to $50,000.

The fourth automobile mentioned is the Buick sedan involved in the accident, "Protects Interests Of" Earl Maxwell up to $50,000.

For more than twenty-five years, the rule in New York State has been that registration in the name of a specified person, constitutes *prima facie* proof of ownership of the automobile and that the automobile is in use for the benefit of the registered owner and on his own account.

Ferris v. *Sterling*, 214 N. Y. 249;
St. Andrassy v. *Mooney*, 262 N. Y. 368.

Thus, the likelihood is that in case of an accident, the registered owner will be sued (proof of liability having been made so simple). It is perfectly natural, therefore, to insure the registered owner (the salesman or corporate officer who uses his own automobile in the corporation's business), for larger limits than is obtained for the employer of the registered owner.

It was likewise perfectly natural for the Maxweld Corporation to insure itself for the larger limits with respect to the Ford roadster which was owned by it.

The Circuit Court seemed to be impressed by the fact that the total premium (213.00 plus 51.87 plus 13.00) shown by the face of the policy, coincided with the total premiums (54.05 plus 210.82 plus 13) specified in the rider.

There was no evidence whatever as to how and why the premiums were reallocated as stated. If any such question had been presented at the trial, explanation of proper insurance practice could have been made.

The District Judge clearly pointed out that if Maxweld Corporation was covered up to $50,000 as to all the automobiles, by the general provisions of the policy, there would have been no occasion to specifically mention the Maxweld Corporation in the rider which included $50,000 coverage as to its Ford roadster (R. 93).

The Circuit Court wholly ignored the premium charge of $213 for the $10,000 limit; concluded that the construction adopted by it "corresponds with the popular conception that a particular car * is 'insured' ", and stated that it was not necessary to mention the Maxweld Corporation's Ford roadster in the rider to define the increased coverage because mention thereof in the rider "was desirable to preserve the symmetry of statement and add to clarity" (R. 120).

Courts are not at liberty to intrude language of their own selection in a plain provision, "or exclude from the policy its plain provisions."

Weiss v. *Preferred Acc. Ins. Co.*, 241 App. Div. 545 at 549, 550, 272 N. Y. Suppl. 653 at 657, 658.

"Courts are not at liberty to revise while professing to construe."

Sun P. & P. Assn. v. *Remington P. & P. Co.*, 235 N. Y. 338 at 346.

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* Insurance does not follow the automobile. It follows the owner. *Reinhart* v. *Indemnity Co.*, 25 Ohio N. P. (N. S.) at 336.

To reconcile its interpretation with the language of the policy, the Circuit Court drew upon the Extended Coverage clause and concluded that "it is made clear by these statements that" the insurance inured first to Maxweld Corporation, the named assured (R. 121).

The scope and applicability of the Extended Coverage clause has been definitely prescribed by the highest court of New York. The Circuit Court did not follow the citations of the New York law but assumed to ascribe a new meaning to the clause by using it to extend the amount of the coverage.

The Extended Coverage clause, required by the New York statute, must insure the owner for the negligence of any person legally using or operating the automobile with the owner's express or implied permission. The policy in suit also included a provision that any insurance under the policy shall be applied first to the protection of the named assured and the remainder, if any, to the protection of any other assured.

The courts of New York have ascribed to the Extended Coverage clause its plain meaning.

> "* * * The primary purpose of the extended liability clause contained in section 109 is to meet the defense in an action on the policy that the owner was not at the time of the accident operating the car personally or by his agent, although it was being operated by a member of his family or another with his consent, express or implied. The purpose is not to make insurance compulsory or to prevent limitation of coverage (citing authority)."
>
> *Lavine* v. *Indemnity Insurance Co.*, 260 N. Y. 399 at 407;
>
> *Devitt* v. *Continental Casualty Co.*, 269 N. Y. 474.

The provision that any insurance under the policy shall be applied first to the protection of the named assured and the remainder, if any, to the protection of any other as-

sured likewise does not alter the amount of coverage. It merely covers the familiar incident where a person may carry insurance covering his car, and his wife may drive the car, she being covered as already stated by the Extended Coverage clause even though not mentioned by name in the policy. If through the negligence of the wife several persons are injured in the same accident, and some of them sue the owner (the named assured), while others sue the driver (the assured under the Extended Coverage clause), then the insurance protection runs first to the owner, and if there remains any coverage not then exhausted, it is applied to the person driving the car.

See *Lahti* v. *Southwestern Auto Ins. Co.*, 109 Cal. App. 163.

The printed paragraph in the policy entitled "Assured and Named Assured Defined," previously quoted, plainly can play no part in construing the policy to extend the increased coverage. That clause, in harmony with the Extended Coverage clause, imposes obligations upon, as well as it grants privileges to, the insured. The assured is required to give notice of an accident, is required to cooperate with the insurance company, forfeits the insurance if guilty of misrepresentation or fraud, agrees to subrogation of the insurance company, etc. In other words, whatever any assured is required to do, the named assured is included.

It is difficult to perceive how petitioner could have used more precise language to show that the increased coverage is solely that provided by the rider.

If the decision in the case at bar stands, then it will not matter how specific an insurance company may be in describing various coverages. If the policy contains the Extended Coverage clause, in obedience to the statute, or the printed general definition referred to, then every risk would

be automatically insured for the maximum coverage of the policy regardless of specific language to the contrary.

The Circuit Court of Appeals has imposed liability to an amount of coverage not contracted for or paid for.

The $50,000 coverage for Earl C. Maxwell carried the suburban Suffolk County premium of $40.64 (Exh. 5). The $50,000 coverage for the Ford roadster owned by Maxweld Corporation carried the Brooklyn premium of $129.54. Franz resided in Queens County. The premium rate for Brooklyn is apparently also different from the rate for Queens. In any event, only $20,000 was carried for Franz at a premium of $54.05.

If Maxweld Corporation of Brooklyn had desired coverage to the extent of $50,000 on all the cars, the petitioner insurance company might have refused the risk entirely unless all the cars carried the Brooklyn premium based upon $50,000 coverage.

II.

The rule of strict construction, applied by the Circuit Court of Appeals, is contrary to the law of the State of New York, applicable to the situation of the parties.

The Circuit Court of Appeals wrote (R. 121) that if there were any doubt as to the meaning of the policy, it should not inure to the benefit of the insurance company which wrote the contract.

Under the New York law, the policy would be strictly construed against the company as between the company and the insured. The Extended Coverage clause should not have been considered at all in interpreting the language of the policy. That clause merely extended the terms of the policy to anyone operating the automobile with the consent of the insured, such operator being covered by the policy as an additional insured by virtue of the Extended Coverage clause required by the New York Statute. That clause

had no bearing in determining the amount of the coverage provided by the policy. The rule of strict construction would not be applicable in favor of the additional insured. There is no contractual relation or privity of interest between the insurer and the additional insured.

American Lumbermen's Mut. Cas. Co. v. *Trask*, 238 App. Div. 668, 266 N. Y. Suppl. 1, affd., no op., 264 N. Y. 545.

The respondents brought this action against petitioner insurance company under the provisions of Section 109 of the New York Insurance Law authorizing suit against the insurance company because of inability to collect from the insured. The right accorded to the injured person to bring suit against the insurance company "owes its parentage to the statute rather than to the contract of insurance. The policy adopts, under compulsion, the provisions of the statute. Under such circumstances it is idle to say that this is an action upon a contract rather than one under the statute."

Jackson v. *Citizens Casualty Co.*, 277 N. Y. 385.

The New York statute is in derogation of the common law and must be strictly construed.

Royal Indemnity Co. v. *Travelers Ins. Co.*, 244 App. Div. 582, 280 N. Y. Suppl. 485, affd., no op., 270 N. Y. 574.

The Extended Coverage clause is as much a part of Section 109 as the provision thereof giving a direct cause of action to the injured person against the insurance company. Both provisions are part of the same statute. Both are required to be included in the policy.

Inasmuch as the clause was compulsory, the Circuit Court of Appeals should not have permitted the same to influence its construction of the policy to the extent that it did.

There are other features, which could be presented by extending the discussion, such as the statement by the Circuit Court of Appeals that the jury's verdict in the negligence action survived in full notwithstanding the specific language to the contrary by the New York Court of Appeals (R. 68), the significance which should be ascribed to the fact that under the then existing law, the liability of Earl Maxwell abated upon his death and other matters of secondary importance. The amount of the reserve set up by the petitioner insurance company was also urged by respondents in aid of construction of the policy. As the Circuit Court of Appeals did not consider that feature, it will not be now discussed.

Conclusion.

Upon the grounds assigned, it is respectfully submitted that the petition for certiorari should be granted.

FREDERICK A. KECK,
Counsel for Petitioner.

FRED L. GROSS,
On the Brief.

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 607.

AMERICAN LUMBERMENS MUTUAL CASUALTY COMPANY OF ILLINOIS,

Petitioner,

—against—

ELIZABETH SUTCLIFFE, as Administratrix *de bonis non* of the goods, chattels and credits which were of MARGARET SUTCLIFFE, deceased, GEORGE FUERST and ELIZABETH SCHENCK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Anthony J. Travia

FRANCIS J. NICOSIA,
Counsel for Respondents.

JOSEPH GIORDANO,
On the Brief.

ALPERT PRESS, 138 LIVINGSTON STREET, BROOKLYN, N. Y., TEL. TRIANGLE 5—1058-1059

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Statute.

Supreme Court of the United States

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUMMARY STATEMENT.

On December 5, 1934, respondents were injured and respondents' intestate was killed in an automobile collision on a New York highway. They instituted actions to recover damages for personal injuries and wrongful death in the Supreme Court of the State of New York against petitioner's assured, Maxweld Corporation. Respondents recovered judgments in that action, which judgments were affirmed by the Appellate Division and the Court of Appeals of the State of New York.

As judgment creditors of petitioner's assured, respondents, by virtue of the authority of the New York Insurance Law,

Section 109, sued petitioner directly on a policy of automobile liability insurance in the Supreme Court of New York (54). Petitioner removed the action to the United States District Court for the Eastern District of New York where the action was tried without a jury. Upon this trial petitioner conceded its liability to respondents under the policy to the extent of $10,000.00 (126). Respondents claimed that the policy covered petitioner's assured with respect to the automobile involved in the accident to the extent of $50,000.00 (54). The District Court found for the lower limits (R., 87) and rendered judgment accordingly (R., 100).

From this judgment, respondents appealed to the United States Circuit Court of Appeals for the Second Circuit contending that the terms of the policy clearly provided for coverage of $50,000.00 for the automobile involved. The Circuit Court of Appeals sustained respondents' contention (R., 115) and modified the judgment accordingly (R., 121).

Respondents' Position.

The decision of the Circuit Court of Appeals is not in conflict with applicable local decisions.

A. Contrary to petitioner's assumption, the Circuit Court of Appeals did not hold that the amount of coverage under the policy was derived from or determined by the Extended Coverage Clause of the policy nor did it hold or even intimate that said clause prohibited a limitation of the amount of coverage.

1. The local court decisions cited in the petition as in conflict with the Circuit Court's decision have neither identity nor similarity with the subject matter of the Circuit Court's decision; are wholly irrelevant to any question decided therein and, accordingly, cannot be in conflict with the decision in any manner whatsoever.

2. Even accepting petitioner's erroneous interpretation of the Circuit Court's decision as correct, petitioner fails to

demonstrate any conflict between the decision as interpreted by it and the decisions of the local courts.

3. The Circuit Court's opinion is a clear and reasonable interpretation of the policy of insurance determining the amount of coverage from the provisions of the policy pertinent to the issue and looking to the whole policy, including the Extended Coverage Clause, as instructive in determining the intent of the parties to the policy.

B. The Circuit Court of Appeals did not apply the rule of strict construction against petitioner.

1. The Circuit Court expressly stated that there was no need to apply the rule of strict construction as it found no doubt or ambiguity in the language of the policy.

2. As it is the settled law of New York that the effect of Section 109 of the New York Insurance Law is to give the injured claimant all the rights of the assured, even if the rule of strict construction were applied it would have been consistent with the law of New York which is that, in case of doubt as to the meaning of the words of a policy, they should be resolved against the drawer of the policy.

ARGUMENT.

POINT I.

PETITIONER'S INTERPRETATION OF THE CIRCUIT COURT'S DECISION IS ERRONEOUS. EVEN UPON ITS INTERPRETATION THERE APPEARS NO CONFLICT WITH LOCAL DECISIONS.

In undertaking the construction of the policy, the Circuit Court of Appeals rightly accepted the adjudications of the State Court on the issues of ownership and control of the insured automobile as *res judicata* in accordance with the settled law of New York (R., 116) and did not consider the

question as one of general law. The case of *New York Life Insurance Company* v. *Jackson*, 304 U. S. 261, was an action brought by the insurer to cancel the reinstatement of a life insurance policy on the ground that it was obtained by fraud. The lower court considered the question as one of general law, but the Supreme Court of the United States held that its decision should have been made according to the applicable principles of the state law which governed the interpretation of the policy and it was because of that error that certiorari was granted.

Erie R. R. v. *Tompkins*, 304 U. S. 64;
Ruhlin v. *N. Y. Life Ins. Co.*, 304 U. S. 202.

The construction of the policy by the Circuit Court of Appeals in the case at bar was based upon a meticulous examination and analysis of all of its provisions. The issue of the amount of coverage "must be answered from the policy itself" (R., 117).

The Circuit Court determined the amount of coverage from the provisions of Special Condition 8 (R., 117); the entries upon the typewritten attached schedule (R., 118); the specific premium entered thereon (R., 119) and the Increased Public Liability Limits Clause (R., 120) as well as all of the General Conditions of the policy (R., 120). The Extended Coverage Clause was considered by the court as were other "General Conditions" of the policy because they were instructive and "entirely consistent with our conclusion that whoever else may be protected, the 'Named Assured' herein is certainly protected, and is protected to the utmost extent of anyone in the premises" (R., 120).

The Circuit Court's opinion demonstrates conclusively that it determined the amount of coverage from the provisions of the policy other than the Extended Coverage Clause which it nevertheless considered as further supporting and as consistent with the court's conclusion. There is no intimation in the opinion that the Circuit Court employed the Extended Coverage Clause to determine the amount of cov-

erage or to extend the amount of coverage, as petitioner subtly suggests.

The Circuit Court did not and respondents do not dispute that the amount of coverage afforded the Named Assured as determined by the Circuit Court from the schedule and other provisions of the policy, was, by the provisions of the Extended Clause, extended to persons not named in the policy. But the Circuit Court was not called upon to construe the meaning of the Extended Coverage Clause. It was called upon to determine the amount of coverage to the Named Assured. Whether the coverage to the Named Assured extended to others was outside the issue.

The utter futility of petitioner's argument appears conclusive from the presupposition that to extend the amount of coverage to others not mentioned in the policy, as rightly claimed by petitioner, there must exist a fixed amount of coverage for the Named Assured. The Circuit Court confined itself to the issue of determining the amount of coverage to the Named Assured which it did by a reasonable interpretation of the plain import of an unambiguous contract.

The local decisions cited have no applicability to the issue decided and bear no similarity to the facts or situation presented. Their citation by petitioner demonstrates a reckless disregard for relevancy. Being wholly irrelevant there cannot be demonstrated any conflict of any nature.

In *Weiss* v. *Preferred Acc. Ins. Co.*, 241 App. Div. 545, the Supreme Court of New York held that an insurer, under a policy of insurance which expressly excluded from its coverage any liability arising from the operation of an automobile by one under the legal age limit of eighteen years, is not liable for any judgment obtained against its insured by reason of such illegal operation of the automobile.

Deritt v. *Continental Casualty Co.*, 269 N. Y. 474, was to the same effect holding that where the policy specifically provides that the assured shall forfeit his rights under the policy if he permits anyone under the age limit fixed by the laws of the State of New York to operate his motor vehicle,

the insurer is not liable to injured persons for the risk was specifically excluded from coverage and Section 109 of the Insurance Law does not have the effect of extending the liability of the insurer to cover such operation specifically excluded.

The foregoing cited cases obviously have no similarity or relevancy to the case herein. They may only serve to support the Circuit Court's opinion that if the policy intended to limit the amount of coverage or separate the liabilities thereunder, appropriate specific provisions could and would have been made.

Lavine v. *Indemnity Ins. Co.*, 260 N. Y. 399, involved the construction of a policy entirely unlike the one involved herein. The policy was known as an "automobile garage public liability policy" wherein the assured was not the owner and it contained an express limitation that the insurer's liability would attach only in case of accidents resulting from the use of automobiles for a purpose usual to the assured's operations of its sales business in Albany, New York. Accordingly, where a person was injured by an automobile used in connection with its Schenectady business, the insurer was not held liable.

It is manifest from the Circuit Court's opinion that it construed the whole policy according to the sense and meaning of the terms used therein as understood in their plain, ordinary and popular sense (R., 121). The Circuit Court found no ambiguity. It said: "As we analyze the policy we do not think there is substantial doubt * * *" (R., 121). Both sides agreed that there was no ambiguity in the language of the policy (R., 33).

It is the settled law of New York that a contract of insurance, like other contracts, is to be construed according to the sense and meaning of the terms used, which, if clear and unambiguous, are to be understood in their plain, ordinary and popular sense.

Auerbach v. *Maryland Casualty Co.*, 236 N. Y. 247;
Savery v. *Comm. Trav. Mut. Acc. Ins. Co.*, 238 App. Div. 189.

The written provisions prevail over the printed parts of a policy.

Metzger v. *Aetna Ins. Co.*, 229 App. Div. 26.

The premium may be resorted to as a guide to discover the amount intended to be insured.

Post v. *Phoenix Ins. Co.*, 10 Johns 79.

Manifestly, the Circuit Court applied these fundamental principles of the New York law in construing the policy, thus using the same rules of construction as are applied by the local courts.

POINT II.

PETITIONER'S REASON (6) (PAGE 2 OF THE PETITION) ASSUMES (1) THAT THE CIRCUIT COURT APPLIED THE RULE OF STRICT CONSTRUCTION AGAINST THE INSURER, AND (2) THAT SECTION 109 OF THE INSURANCE LAW MUST BE STRICTLY CONSTRUED. BOTH ASSUMPTIONS ARE ERRONEOUS. EVEN ASSUMING THE ASSUMPTIONS TO BE CORRECT, THERE WOULD BE NO CONFLICT WITH LOCAL LAW.

Petitioner insinuates, but does not directly say, that Section 109 of the New York Insurance Law, being in derogation of the common law, should be strictly construed, but petitioner undoubtedly knows that the Court was not called upon here to construe Section 109. The sole issue was the construction of a contract of insurance. True, the insertion of some of the provisions of this contract is compelled by Section 109 and plaintiffs are made beneficiaries thereby, but it is nonetheless the construction of a contract of insurance and not Section 109 which was in issue.

It is a fundamental legal principle in New York that the rule of strict construction applies only in cases of ambiguity in the language of insurance policies. Concededly, there existed no ambiguity (R., 33). The Circuit Court so found

(R., 121). The Circuit Court, summing up its opinion on this point, says at page 121 of the record:

> "As we analyze the policy we do not think there is substantial doubt (and, hence, we do not consider plaintiffs' exceptions to the exclusion of evidence claimed to afford light as to its meaning); although if there is any, it should not inure to the benefit of the company which wrote the contract. *Strochmann v. Mutual Life Ins. Co.*, 300 U. S. 435, 57 S. Ct. 607."

Clearly, the Circuit Court expressly stated that the contract not being ambiguous, it was not necessary to apply the rule of strict construction.

Even if the Circuit Court had applied the rule of strict construction, it would have pursued a course consistent with and not in conflict with the established local law.

It is the settled law of New York that by virtue of Section 109 of the New York Insurance Law, the rights of the injured person to recover against a liability insurance carrier are co-extensive with the assured's right.

> "The effect of the statute is to give to the injured claimant a cause of action against an insurer for the same relief that would be due to a solvent principal seeking indemnity and reimbursement after the judgment had been satisfied."
>
> *Coleman v. New Amsterdam Casualty Co.*, 247 N. Y. 271, 275.

All the rights of the assured vest by state law in the injured judgment claimant.

> *Merchants Mutual Automobile Lia. Ins. Co. v. Smart*, 267 U. S. 126, 130, 131.

As between the writer of a policy of insurance and the beneficiary thereof, whether the beneficiary is created by statute or otherwise, it is fundamental that in case of ambiguity the policy shall be construed strictly against the

writer, particularly so in view of the settled law of New York that the injured judgment claimant is vested with all the rights of the assured.

The cases cited by petitioner do not in any way impair this conclusion nor do they demonstrate any probable conflict with the Circuit Court's opinion, even assuming that the Circuit Court applied the rule of strict construction.

American Lumbermen's Mutual Cas. Co. v. *Trask*, 238 App. Div. 668, aff'd., no. op., 264 N. Y. 545, was a case wherein the Named Assured loaned her car to an automobile sales agency for demonstration purposes. The borrower struck the injured persons who obtained judgments against both the assured and the borrower. The borrower and the assured's carrier each paid one-half of the judgments. The carrier sued the borrower for reimbursement of the one-half paid by it. The borrower contended that by the terms of the policy the relation of insured and insurer was created between it and the carrier while it operated the automobile with the consent of the assured and, hence, being an assured under the policy, it owed no obligation for reimbursement to the insurer.

The Court held that the borrower was a total stranger to the policy and was not a beneficiary thereof by virtue of the terms of the policy or by virtue of any statute. That, therefore, the rule of strict construction could not apply between a stranger and the insurer. The case did not involve the rights of the injured person, whose judgment, it will be noted, was partially paid by the insurer. The case did not involve the rights of a beneficiary of the policy as it does here, a beneficiary made such by statute as well as by the contract. The case is wholly irrelevant to petitioner's alleged point. As between the injured judgment claimant and the insurer, can it be seriously disputed that the policy would be construed strictly against the insurer in view of the settled law that the injured person is vested with all the rights of the assured?

Jackson v. *Citizens Casualty Co.*, 277 N. Y. 385, has no bearing on the issues whatsoever. This case stands for the proposition that as Section 109 of the Insurance Law specifies the class exclusively to whom the rights of the assured are given, namely, injured judgment claimants, the cause of action accorded to this class by the statute is not assignable.

The irrelevancy of the case and its obvious lack of similarity to the case herein precludes any probability of conflict with the Circuit Court's decision.

In the case of *Royal Indemnity Co.* v. *Travelers Ins. Co.*, 244 App. Div. 582, affd. (no. op.), 270 N. Y. 574, the Court of Appeals had occasion to pass upon the portion of Section 109 of the New York Insurance Law, which gave substantive rights in derogation of the common law, that is, the portion which created new beneficiaries. In that case the Court held that the right of action therein, being given only to injured persons, a compensation insurance carrier, subrogated to the rights of the injured, may not maintain an action against the public liability automobile insurer. This substantive right being created in derogation of the common law is to be strictly construed.

In a case passed upon later, however, namely, *Materazzi* v. *Commercial Casualty Co.*, 157 Misc. 365, 283 N. Y. S. 942, affirmed in 283 N. Y. S. 430, leave to appeal to the highest appellate tribunal of New York denied in 284 N. Y. S. 358, the Court said:

> "The statute is remedial in nature and should not be narrowly construed."

Though the statute must be strictly construed, it does not follow, however, as petitioner seeks to imply, that the policy shall be strictly construed against the beneficiaries. Petitioner's theory is both fallacious and inconsistent with the local courts' decisions that the injured persons named in the statute shall "stand in the shoes" of the assured and become vested with all the rights that the assured is entitled to under the policy.

CONCLUSION.

IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

FRANCIS J. NICOSIA,
Counsel for Respondents.

JOSEPH GIORDANO,
On the Brief.